FILE COPY

No. 309

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

WILLIAM H. DANFORTH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, and to the Associate Justices:

The petitioner, William H. Danforth, an individual, respectfully shows to the Honorable Court:

I.

STATEMENT OF MATTER INVOLVED.

This is a suit brought by the United States to obtain an easement for flowage rights over the petitioner's farm, consisting of 1,033.56 acres in Mississippi County, Missouri, pursuant to the Floodway Act of May 15, 1928 (R. p. 4).

The Government, pursuant to the said act, and as part of the project, had previously condemned and taken 105.34 acres extending along the whole western side of this farm (Exhibit A—hereto attached) and used the same as part of the set-back levee (R. p. 237), which was built from Bird's Point in a general southwestern direction to New Madrid.

This set-back levee was begun October 21, 1929, and was 98.9 per cent completed on October 31, 1932. For all practical purposes the levee was completed on October 31, 1932 (R. p. 196). Since that time the only work done was to replace slides (R. p. 196).

The said act provides, among other things (Sec. 702D):

> • • • "When the owner of any land, easement or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price. • • •"

The act in question refers to the engineering plan submitted by the Chief of Engineers to the Secretary of War, dated December 1, 1927, and printed in House Document No. 90, Seventieth Congress, First Session, and authorizes the project to be prosecuted under the **direction** of the **Secretary of War** and the supervision of the **Chief of Engineers**. Pursuant to authority under the act of **Section 1** of the same **the President** of the United States approved the Board provided for in the act, and reserved the right to make provisions for acquiring rights in land for constructing spillways and floodways. Accordingly, on December 11, 1928, he issued a presidential proclamation in connection with acquiring flowage rights, in which proclamation he provided for the purchase of flowage rights over the land within the floodway, between the existing riverside levee and the back (westward) levee, and in which he provided "that in no case shall the purchase price for the

flowage on the land above the backwater area in the southern part of the floodway be more **than 66 per cent** of the present assessed valuation of this land" (R. p. 193). (Emphasis ours.)

Pursuant to the said law and the said presidential proclamation, and **within the said 66 per cent**, of the then assessed value (R. p. 195) the Secretary of War, through military channels, offered the petitioner the sum of $31,-681.98 for flowage rights over the above mentioned tract of land (R. p. 164). This was duly accepted by petitioner within the time authorized by the Government (R. p. 170, Exhibit K). Prior to the time that the said offer of $31,-681.98 was made, the Government had had three appraisals made, one by the Department of Agriculture, one by army engineers, and one by local men (R. p. 160). Several months after the **acceptance** of the Government's offer by petitioner, the Government, through the same military officer, Major Brehon Somervell, wrote to petitioner withdrawing the said proposition (R. p. 185). The offer and acceptance were couched in the following language:

"War Department
U. S. Engineer Office
1006 McCall Building
Memphis, Tenn.

Jan. 14, 1932

Subject: Offer of flowage rights, Bird's Point-New Madrid Floodway.

To: Mr. W. H. Danforth,
c/o Purina Mills,
St. Louis, Mo.

1. The Secretary of War has authorized payment for flowage easements in the Bird's Point-New Madrid Floodway, either at the maximum rates authorized by

order of President Coolidge, Dec. 11, 1928, or at the appraised values of flowage as recently determined by the Department of Agriculture, where such appraisals exceed the rates authorized by the executive order mentioned.

2. I am accordingly directed by the Chief of Engineers, U. S. Army, to offer you Thirty-one thousand six hundred eighty-one and 98/100 Dollars ($31,681.98) for a perpetual flowage easement as contemplated by the Act of May 15, 1928, on the inclosed plat, this being the maximum amount that can be offered you under the above authorization.

3. Should this offer be accepted, friendly condemnation proceedings will be entered in Court, with the request that an agreed verdict be awarded in the amount of this offer. Payment cannot be made without Court action as title cannot be cleared. Acceptance of this offer should expedite final settlement and reduce legal expenses.

4. If your acceptance is not received in this office during the next thirty days, it will be assumed that you reject this offer. If acceptance is made, sign and return original of offer. A return addressed envelope which requires no stamp is inclosed.

Very truly yours,

Brehon Somervell,
Major, Corps of Engineers,
District Engineer.

Incls.
Tract map;
General map of floodway;
Addressed return envelope.

Accepted: Wm. H. Danforth,
(Owner)
c/o Purina Mills,
St. Louis, Mo.
(Address)
March 2, 1932
(Date)."

Following its repudiation of the agreement fixing the damages, the Government filed a condemnation suit on September 25, 1933, for the flowage rights over the said tract of land (R. p. 4). The petitioner filed an answer and counterclaims in said suit, setting out the written offer of the Government and the petitioner's acceptance of the same within the time authorized by the Government (R. p. 21). The said pleadings also denied the allegations in the Government's petition that the parties were unable to agree upon the amount of flowage damage (R. p. 22). The said pleadings also set out that the actual damages were in excess of $31,681.98, but that the said sum was accepted as a compromise and settlement, and that the parties had by contract fixed that sum for the flowage easements (R. p. 21). The counterclaim prayed for judgment against the Government in the sum of $31,681.98 with interest, and further prayed that the Court decree an easement in favor of the Government for the perpetual flowage easement (R. p. 25).

The allegations of the answer and counterclaim were conclusively proven through depositions taken of ex-Secretary of War, Patrick J. Hurley, Major-General Edward M. Markham, Chief of Engineers, and Major Brehon Somervell the officer in charge at Memphis, who was ordered by the Secretary of War to make the offer aforesaid (R. pp. 116-128). Although the said answer and counterclaim were duly filed, by leave of Court, upon motion of the Government, the Court struck the same out upon the theory that a counterclaim could not be filed in the case because, as the Court stated, the Government, even when acting through its appointed authorities, could not agree to limit the jurisdiction of the Court (R. p. 40).

At every step this petitioner claimed that the agreement in question fixing the damages or value of the flowage rights was binding, and after the Court struck out the

said answer and counterclaim, raised the same issue in exceptions filed to the viewers' report (R. pp. 57 and 68), and also filed a motion for judgment setting out the same facts set out in the answer and counterclaim (R. p. 41).

The Court ruled adversely to this petitioner, one District Judge ruling that an answer and counterclaim would not lie (R. p. 40), the successor holding that an answer should have been filed (R. p. 49), overlooking the fact that same had been stricken from the record by the first trial judge. The Court, over petitioner's objections and exceptions, appointed viewers, and affirmed an award of $17,921.70, after overruling the motion of the petitioner for judgment in the sum of $31,681.98 (R. p. 78).

Deeds of trust aggregating $48,000 on the property in question were paid off in full to the Northwestern Mutual Life Insurance Company prior to the last hearing, so that petitioner is the only one who has any interest in the land (R. p. 89).

Lieutenant-Colonel Eugene Reybold of the Corps of Engineers, U. S. Army, stationed at Memphis, Tennessee, had charge of the district in question in January, 1937. At that time he issued instructions to dynamite the levee during a flood in January of 1937, or as the Colonel testified, "he placed the Bird's Point-New Madrid Floodway in operation" (R. p. 199). Major R. D. Burdick also testified that he was authorized and directed to open the fuse plug section of the levee to place the said project in operation in January, 1937 (R. p. 201). The evidence showed that just prior to the time of the Floodway Act in 1928 the Northwestern Mutual Life Insurance Company was lending money on a basis of $50.00 an acre in the area where this land was located; that they did not make any loans since the Floodway Act went into effect in areas within the spillway, although they had applications for them (R. p. 187).

The trial court refused to allow **interest** on the said award of $17,921.70, holding that there has been no "taking."

This case was argued twice before the Court of Appeals. In the first opinion of March 4, 1939, reported 102 Fed. (2nd) 5, the Court of Appeals modified the judgment of the trial court to the extent of holding that there was a **"taking"** as of October 21, 1929, and allowed interest as of that date, but held that while the contract between the Government and this petitioner fixing the damages was **valid** and **binding** and could be enforced by the Government, it could not be enforced by the landowner in the District Court in the suit at bar (R. pp. 224-225). On motion for **rehearing**, filed by the **Government**, the Court of Appeals set aside the judgment which it had entered, and set the case down for rehearing on May 12, 1939, **limiting the argument** only to the question of **when** there was a **taking** (R. p. 232). Under date of July 11, 1939, the Court of Appeals affirmed the judgment of the trial court, reversing itself on the question "of taking," and holding that the property in question has not yet been taken, although the same court, under date of February 8, 1939, in the case of **Sponenbarger et al. v. United States**, 101 Fed. (2nd) 506, a suit coming up from the District Court for the Eastern District of Arkansas under the same Act of May 15, 1928, under similar facts, held that there **was** a "taking." This Court has recently granted certiorari in the Sponenbarger case. There is also now pending before this Court on certiorari the case of **Franklin et al. v. United States**, 101 Fed. (2nd) 459, involving the question of a **"taking"** and arising under the same Flood Control Act of May 15, 1928, coming up from the Sixth Circuit. In the Franklin case the Court of Appeals for the Sixth Circuit held there was no taking or appropriation, with Circuit Judge Hamilton dissenting. In the case at bar the Court of Appeals for the

Eighth Circuit first held there was a taking, and now has reversed itself and holds that there has been no taking.

II.

The principal questions involved are:

1.

Did the Government "**appropriate** or **take**" an easement in the land in question within the meaning of the Fifth Amendment, either

a) When it started to work on the set-back levee on October 21, 1929, or

b) On October 31, 1932, when the set-back levee was completed, or

c) When Congress passed the Flood Control Act May 15, 1928 (33 U. S. C. A., par. 702a et seq.), and adopted a plan of flood control, which involves an intentional, additional, occasional flooding of complainant's land as soon as the Government began to carry out the project authorized?

2.

Does the rule of law announced by this Court in a number of cases to the effect that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter, apply only as held by the Court of Appeals to admiralty cases (R. p. 227), or does the rule apply also to law cases?

a. Can the United States repudiate an admittedly valid contract duly and lawfully entered into, fixing the value of an easement or the damages occasioned by the Floodway Act project, then bring condemnation proceedings, and claim sovereign immunity when the said contract is as-

serted in the condemnation suit as the agreed measure of damages?

III.

REASONS FOR GRANTING THE WRIT.

A.

Question of Taking.

a) The Court of Appeals for the Eighth Circuit in holding that there was no taking of the easement in question has decided the question probably in conflict with the following applicable decisions of the Supreme Court, particularly the case of Hurley v. Kincaid, 285 U. S. 95, involving the same question and construing the same act, where the Supreme Court said:

> "We may assume that as charged the mere adoption by Congress of the Plan of Floodway Control, which involves an intentional, additional, occasional flooding of complainant's land, constitutes a taking of it, • • • as soon as the Government undertakes to carry out the contract authorized."

Jacobs v. U. S., 290 U. S. 13, holding that intermittent overflows of agricultural land, in consequence of the construction of a dam by the Government, is a partial taking.

U. S. v. Lynah, 188 U. S. 445, holding that a rice plantation becoming a bog as a necessary result of an improvement in navigation constitutes a taking, for which the United States is liable, although the taking is in the exercise of the Government's power to improve navigation.

Pumpelly v. Green Bay & Miss. Canal Co., 80 U. S. 166, holding that the backing of water so as to overflow land or any other superinduced addition of water, earth, sand, etc., or artificial structure placed on land, if done under

statutes authorizing the same for public benefit, constitutes a taking and demands compensation.

United States v. Cress, 243 U. S. 316, holding that compensation must be paid to the owner of land affected by backwater resulting from construction and maintenance by the United States in aid of navigation of a lock and dam upon a river, whereby the level of such river along stretches is raised.

b) The opinion of the Circuit Court of Appeals is in direct conflict with United States et al. v. Kincaid, 49 Fed. (2nd) 768 (C. C. A. 5), passing upon the same question and construing the same act, sustaining the District Court, 35 Fed. (2nd) 235, and 37 Fed. (2nd) 602, holding that there is a taking under identically the same facts as in the case at bar and under the same act.

c) The opinion of the Court of Appeals is also in conflict with a very well reasoned case construing the same act on the same question in an able opinion by Borah, District Judge for the Eastern District of Louisiana, handed down August 22, 1933. U. S. v. Yazoo etc. R. Co., 4 Fed. Supp. 366. This was appealed by the Government and reversed and remanded upon stipulation of the parties, a settlement apparently having been effected. 67 Fed. (2nd) 1019.

d) The opinion is in direct conflict with the case of Sponenbarger v. U. S., 101 Fed. (2nd) 506, decided February 5, 1939, by the Circuit Court of Appeals for the Eighth Circuit. Identically the same question is involved, under the same act. In the Sponenbarger case the Court of Appeals held; (1) that the floodway was in operation; (2) that the landowner's protection was decreased; (3) that Congress by the passage of the Flood Control Act of 1928 adopted the Jadwin plan as a fixed project in all of

its essential features; (4) that Congress has assumed exclusive control of the fuseplug levee, thereby excluding property owners from their right of self-defense against floods. (The Court of Appeals in the case at bar has repudiated the above four holdings.)

This Court has recently granted certiorari in the Sponenbarger case. It would add but little to the burdens of the Court to consider the case at bar at the same time.

e) This Court also recently granted certiorari in the case of Franklin v. U. S., 101 Fed. (2nd) 459 (C. C. A. 6), where the Court held that the construction by the Government of dikes on the bank and bed of the Mississippi River for the purpose of changing the current to improve navigation, resulting in washing away of plaintiff's land on opposite sides of the river, was not an appropriation.

f) The opinion contravenes the provisions of the Floodway Act of May 15, 1928, Title 33, Sec. 702a, Sec. 702b, Sec. 702c and Sec. 702d, U. S. C. A. The said Flood Control Act is set out in the Appendix.

g) The opinion is untenable and is in conflict with the overwhelming weight of authority (Lewis on Eminent Domain, Par. 65, and cases therein cited; Nichols on Eminent Domain, Par. 436, p. 1147, and cases cited).

h) If this Court holds that there was a taking in the Sponenbarger and in the Franklin cases, supra, this petitioner would be deprived of his property, although this Court will have thus declared the principles announced by the Court of Appeals as erroneous, unless this Court grants certiorari in the case at bar.

i) The question is of great public importance.

There are many cases pending involving the same question of "taking" under the said Floodway Act of 1928, as

shown by the Government records in the District Court for the Eastern District of Arkansas.

B.

On Question of Recovering Value of Easement as Fixed by Contract Between Government and Petitioner.

a) The Court of Appeals in holding that the Government could enforce the contract fixing the value of the easement while the landowner cannot assert the same in a suit brought by the Government to condemn the easement has decided a question probably in conflict with applicable decisions of the Supreme Court as follows:

Luckenbach Steamship Co. v. Norwegian Barque Thekla, 266 U. S. 328, holding that the bringing of a suit by the United States carries with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act, and further holding that when the United States comes into court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done in regard to the subject matter.

In The Nuestra Senors de Regla, 108 U. S. 92, holding that when the Government brings a proceeding in one of its own courts that it is bound by the submission, and it is the duty of the Court to proceed to the final determination of all of the questions legitimately involved.

In The Paquette Habana, 189 U. S. 453, holding that where the United States files a proceeding in court, that an affirmative decree may be rendered against the United States in the said proceeding.

See, also, United States v. Wilkins, 6 Wheat. 135; Gratiot v. U. S., 15 Pet. 336; U. S. v. Bank of Metropolis, 15 Pet. 377; Bull v. U. S., 295 U. S. 247.

b) The opinion of the Court of Appeals is in direct conflict with decisions of other federal courts on the same question.

The Gloria, 286 Fed. 188;
U. S. v. Stephanidis, 41 Fed. (2nd) 958, aff. 47 Fed. (2nd) 554 (C. C. A. 2);
Wachovia Bank & Trust Co. etc. v. U. S., 98 Fed. (2nd) 609 (C. C. A. 4);
The Barbara Cates, 17 Fed. Supp. 241, l. c. 244;
U. S. v. Guaranty Co., 91 Fed. (2nd) 898 (C. C. A. 2);
U. S. v. Bank of N. Y., 83 Fed. (2nd) 236 (C. C. A. 2).

c) The opinion is untenable and in direct conflict with the overwhelming weight of authority (Cases cited supra under b).

d) The question is of great public importance and calls for a pronouncement of this Court on the rights of members of the public to have their rights against the United States decided in the same proceeding brought by the United States where such rights grow out of the same subject matter or transaction.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, demanding the said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in the case numbered 11,255, entitled on its docket William H. Danforth, Appellant, v. United States of America, Appellee, #11,255, at law, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; that the judgment herein

of the said Circuit Court be reversed, and for such further relief as to the Court may seem proper.

Dated August 21st, 1939.

WILLIAM H. DANFORTH,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The second opinion of the United States Circuit Court of Appeals for the Eighth Circuit was handed down July 11, 1939 (not yet reported). The first opinion of the Court of Appeals appears in 102 Fed. (2nd) 5.

II.

JURISDICTION.

1. The statutory provision which we believe sustains it is Judicial Code, Section 240 (a), amended February 13, 1925, Chapter 229, 43 Stat. 938, Sec. 1217, U. S. Compiled Accumulative Supp. 1925, 28 U. S. C. A. 347.

2. The date of the judgment to be reviewed is July 11, 1939.

3. The facts showing jurisdiction have heretofore been set out in the petition under the heading "Statement of Matter Involved." The judgment of the Court of Appeals holding that there has been no taking is set out (R. p. 239). The judgment of the Court of Appeals holding that the trial court had no jurisdiction to fix the amount of damages as per contract of the parties is set out (R. pp. 227-228).

The Floodway Act of May 15, 1928, which is violated by the opinion of the Court of Appeals, is referred to (R. pp. 4-5) in the Government's petition.

The following decisions sustain the jurisdiction of this Court to review the decision of the Court of Appeals on the two questions involved for the reasons set out in the specifications of error:

A.

On question of "taking."

Hurley v. Kincaid, 285 U. S. 95;
Jacobs v. U. S., 290 U. S. 13;
U. S. v. Lynah, 188 U. S. 445;
Pumpelly v. Canal Co., 80 U. S. 166;
U. S. v. Cress, 243 U. S. 316;
U. S. et al. v. Kincaid, 49 Fed. (2nd) 768 (C. C. A. 5);
U. S. v. Yazoo etc. R. Co., 4 Fed. Supp. 366 (reversed on stipulation, 67 Fed. [2nd] 1019);
Sponenbarger v. U. S., 101 Fed. (2nd) 506 (C. C. A. 8) (now pending in this court on certiorari);
Franklin v. U. S., 101 Fed. (2nd) 459 (C. C. A. 6) (now pending before this Court on certiorari).

B.

On the question of the jurisdiction of the trial court to fix the damages as per contract.

Luckenbach Steamship Co. v. Norwegian Barque Thekla, 266 U. S. 328;
Bull v. U. S., 295 U. S. 247;
The Nuestra Senors de Regla, 108 U. S. 92;
The Paquete Habana, 189 U. S. 453;
U. S. v. Stephanidis et al., 41 Fed. (2) 958, aff. 47 Fed. (2) 554 (C. C. A. 2);
Wachovia Bank & Trust Co., Giaridan etc. v. United States (decided Aug. 26, 1938, by United States Circuit Court of Appeals, Fourth Circuit), 98 Fed. (2nd) 609 (C. C. A. 4);
U. S. v. Guaranty Trust Co. of N. Y., 91 Fed. (2nd) 898 (C. C. A. 2);
U. S. v. Nat. City Bank of N. Y., 83 Fed. (2nd) 236 (C. C. A. 2).

III.

A full statement of the case has been given in the petition under the heading, "Statement of Matter Involved,"

which, in the interest of brevity, is hereby adopted and made a part of this brief.

IV.

SPECIFICATIONS OF ERROR.

I.

On Question of Taking.

The Circuit Court of Appeals for the Eighth Circuit erred in the following particulars, to wit:

(1) In holding that the building of the set-back levee was only one essential element in the Jadwin Plan, and that there can be no taking until the height of the upper fuse plug section is reduced about three feet for a distance of eleven miles below Bird's Point, Missouri, and for a distance of about five miles from New Madrid, Missouri (R. p. 236).

(2) In holding that petitioner still enjoys the same use of his land that he always has, although the Government has condemned and taken possession of 105.34 acres along the western part of the farm in question as part of the set-back levee pursuant to the said Floodway Act, and in holding that increasing the depth of water over appellant's land artificially through the building of the set-back levee does not increase the damage to plaintiff's property (R. pp. 237-238).

(3) In holding that the increased depth of water to which appellant's lands are subjected are not the "additional destructive flood waters" referred to in the Act of May 15, 1928, and erred in holding that the increased depth of the water is an incidental consequence for which the Government cannot be held liable (R. p. 237).

(4) In holding that the military officers in charge of the floodway area had no authority to dynamite the existing river levee prior to the completion of the fuse plug section (R. p. 238).

(5) In holding that there is nothing in the Flood Control Act to prevent the raising of the levees by the existing local levee district prior to the construction of the fuse plug sections (R. p. 239).

(6) In holding that the Government had not assumed dominion over the river side levee, although after the flood of 1937 the Government first ordered it to be rebuilt to fifty-five feet and then changed the plan and ordered it built to fifty-eight feet (R. pp. 200, 239).

(7) In holding (R. p. 239) that "appellant's land will not be taken within the meaning of the Act until the upper fuse plug in the riverside levee shall be opened and the land is exposed to 'additional destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River.'"

II.

On Question of Jurisdiction of the Trial Court.

(8) In holding that the District Court had no jurisdiction to hear petitioner's claim or to enter a judgment in the condemnation proceeding upon an admittedly valid contract fixing the extent of the damages for the flowage rights then being taken by court proceedings.

(9) In holding that the rule announced by the Supreme Court to the effect that when the United States comes into court to enforce a claim, it comes not as a sovereign, but as a suitor, and thereby submits to the Court's jurisdiction of just claims relating to the subject matter in-

volved, even to the extent of becoming subject to an affirmative judgment, **is limited** to suits in **admiralty.**

(10) In holding that there is a difference between suits brought by the United States in condemnation proceedings and in other proceedings so far as the character in which the Government brings the suit.

(11) In holding that there is a difference between asserting a claim in opposition to a money demand brought by the Government and to a demand brought by the Government for flowage rights over plaintiff's property.

SYNOPSIS OF ARGUMENT.

A.

Petitioner claims there was a taking, either when the set-back levee was started on October 21, 1929, or at any rate when it was completed on October 31, 1932, or when Congress passed the Flood Control Act on May 15, 1928, and adopted a definite plan of flood control. The decision violates the Flood Control Act itself, which is set out in the Appendix, particularly Sections 3 and 4, providing for procedure on the part of the United States to acquire floodage rights, and providing for the purchase of such floodage rights by the Secretary of War, when, in his opinion, he deems the price reasonable. The decisions supporting the petitioner's contention that there was a taking are set out under Point II of the brief in support of authorities showing jurisdiction of this Court (p. 16).

The opinion of the Court of Appeals in the case at bar is in direct conflict with the case of Sponenbarger v. United States, 101 Fed. (2d) 506, now pending on certiorari, and in conflict with the decisions cited under Subdivision A, Point II, of the Petitioner's Brief, dealing with the jurisdiction of this Court.

The Court of Appeals in its opinion has repudiated its conclusions of law in the Sponenbarger case, and the opinion is in conflict with the Court of Appeals in the case of U. S. et al. v. Lincaid, 49 Fed. (2d) 768 (C. C. A. 5), as well as the other cases cited under Subdivision A of Point II of the brief.

B.

The Trial Court had jurisdiction to fix the damages in accordance with the contract entered into by the United States and this petitioner, prior to the filing of the condemnation suit by the Government. The Government having filed suit, the petitioner was entitled to assert his rights under the contract in question, which the Government admits is a valid contract, but simply contends that it cannot be enforced in a suit filed by the United States to acquire the same floodage rights involved. The decisions are the other way (Authorities cited under Subdivision B of Point II of Petitioner's Brief).

ARGUMENT.

I.

Question of Taking.

We have heretofore adverted to the decisions of this Court and of other courts of appeal, as well as to the Sponenbarger case, decided by the Circuit Court of Appeals for the Eighth Circuit, now pending before this Court on certiorari, in which the question of taking has been determined. It is obvious that the Court of Appeals for the Eighth Circuit is very undecided on the question. It held there was a taking in the Sponenbarger case on February 27, 1939. In the instant case, in an opinion handed down March 4, 1939, the Court of Appeals likewise held that there was a taking when the set-back levee was started on October 21, 1929. This Court granted certiorari in the Sponenbarger case June 5, 1939. On the Government's motion for rehearing, the Court of Appeals reversed its ruling of March 4th, and on July 11th handed down an opinion holding that there was no taking. The Court makes a feeble attempt to dinstinguish the Sponenbarger case by holding that in the Sponenbarger case "under the terms of the act the United States had assumed dominion over the Riverside levee. It is interesting to note that in the Sponenbarger case the Government had not instituted condemnation proceedings. The suit was brought by the landowner against the Government. The Court of Appeals in the Sponenbarger case found:

> 1. "Without question, in the passage of this Act, Congress has assumed control of this fuse plug, and, by entering a field within its jurisdiction, has excluded all local interference with its national powers. • • • In fact the frankly stated object of the Jadwin plan is to protect more than two-thirds of the valley at the

expense of potential damage to property in the floodways in the event of excessive floods. Such discrimination is wanting in the absence of government control of levees, and in the existence of local responsibility for levee or other flood protection."

2. That the Floodway Act was one plan and when the Government began to carry it out that there was a taking.

3. That by the provisions of the plan the flood control is subjected to a planned and practically certain overflow in case of the major floods contemplated and described.

4. That

"So considered, a reasonable construction of Section 4 of the Act of May 15, 1928 (33 U. S. C. A., Sec. 702-d), must regard such as the 'additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River,' for which the United States shall provide flowage rights (Section 4, Act May 15, 1928)."

The Court of Appeals in the Sponenbarger case quotes with approval from one of the briefs of counsel as follows:

"'The Government has deprived the Boeuf Basin landowners of property, to wit: Of certain of the attributes of their property rights in the land in the Boeuf Basin, by designing and constructing a levee system deliberately intended to sacrifice the Boeuf Basin lands for the benefit of a much larger group and for the public good and, among other things, has deprived the Boeuf River landowners of that particular attribute of their property which consisted of their common-law right to protect their lands against floods by raising and strengthening their protective levees and by giving the Government the right to sacrifice the existing levees when necessary to accomplish the general purpose.'"

Compare this holding with the holding in the case at bar, by the same Court, in the last opinion (Rec. p. 234), that the increased depth of water to which this petitioner's land will be subjected upon the completion of the set-back levee is not the additional destructive floodway tiers referred to in the act, just the contrary of the holding in the Sponenbarger case. Compare the holding in the case at bar that there was no taking with the four reasons set out above in the Sponenbarger case that there was a taking.

The Court of Appeals cites (R. p. 238) Bedford v. U. S., 192 U. S. 217; Jackson v. U. S., 230 U. S. 1; Sanguinetti v. U. S., 264 U. S. 146; Gibson v. U. S., 166 U. S. 269, to support its holding that the increase of the depth of water occasioned by the set-back levee is only an incidental consequence for which the Government is not liable.

These cases do not so hold. We refrain from analyzing them only for the sake of brevity. None of them announce such an incredible principle. When considered in the light of the facts these cases do not militate against the Jacobs, Lynah, Pumpelly and Cress cases, cited under "Taking," supra page 16.

See the distinction pointed out in the dissenting opinion of Judge Hamilton in Franklin v. U. S., cited supra.

This Court, in Hurley v. Kincaid, supra, in construing the same act, assumed there was a taking even before condemnation proceedings were filed. This Court held there was a taking in Jacobs v. U. S., 290 U. S. 13, where the Government constructed a dam and intermittently overflowed agricultural land in consequence of the construction; held there was a taking in U. S. v. Lynah, 188 U. S. 445, where a rice plantation was affected as a result of improvements in navigation; held there was a taking in Pumpelly v. Canal Co., 80 U. S. 166, where water was backed up so as

to overflow land, pursuant to statute; held there was a taking in U. S. v. Cress, 243 U. S. 316, where a lock and dam were constructed by the Government in a river whereby the level of the river was raised and the land of the claimant was effected thereby. See also the following cases:

U. S. v. Grizzard, 219 U. S. 180;
Hopkins v. Clemson College, 221 U. S. 636;
Peabody v. U. S., 231 U. S. 530.

We have a decision construing the Act in question under circumstances practically identical with those in the case at bar by the Circuit Court of Appeals for the Fifth Circuit: United States et al. v. Kincaid, 49 Fed. (2nd) 768, and a decision of the Eighth Circuit, Sponenbarger v. U. S., 101 Fed. (2nd) 506, now pending here on certiorari, holding that there is a taking, and we have the case of Franklin v. U. S., 101 Fed. (2nd) 459, Sixth Circuit, under the same act, under somewhat different circumstances, holding there was no taking. (Certiorari granted by this Court.) We now have the case at bar under the same Floodway Act, in which the Court of Appeals for the Eighth Circuit, in its ruling, holds there has been no taking. Some of the Courts of Appeal fail to distinguish the cases where the Government is acting pursuant to law and contemplates compensation and those where the action is tortious and not pursuant to law. In the one case there is an intention to take; in the other there is not. There is also a decision of the Court of Claims construing the said Act and holding there was no taking, although the Court was largely influenced by the fact that the land therein involved was timber land and in the back-water area, having a very low elevation. Mathews v. U. S., 87 C. Cls. 662. The land in question is high and out of the back-water area (R. p. 189).

This conflict of opinions, together with the plain language or mandate of the Flood Control Act of May 15,

1928, itself, C. 569, 45 Stat. 534, U. S. C., Title 33, Sec. 702a et seq., completely justifies this Court in assuming jurisdiction to settle the question of a "taking."

II.

On the question of jurisdiction of the trial court to fix damages as per contract.

In the Government's brief, filed in the Court of Appeals, the Government had the following to say:

> "It may be true that to attain complete justice in one proceeding the appellant should be allowed in the District Court any recovery on the contract to which he may be entitled, especially since the United States could, had it chosen to do so, have enforced it in that forum against him."

The position of the Government, however, and that of the Court of Appeals is that while the Government could enforce the contract in question in the proceeding in this case, the other party to the contract cannot. The Court of Appeals holds that the rulings of this Court on the question here involved are limited to cases of **admiralty**, and that rights against the Government cannot be enforced in proceedings started by the Government, even though pertaining to the same subject matter or growing out of the same transaction. The rule we here contend for has been considerably extended in recent years.

Bull v. U. S., 295 U. S. 247;
U. S. v. Guaranty Trust Co. of N. Y., 91 Fed. (2d) 898, l. c. 900 (C. C. A. 2);
U. S. v. National City Bank of N. Y., 83 Fed. (2d) 236 (C. C. A. 2).

If the Government had not brought the suit herein involved there would be a different situation, but having brought the suit in which it sought to have the damages assessed the landowner had a right to ask the Court to fix

the damages at the amount contracted for by the parties prior to the bringing of the suit. The claim grew out of the same transaction, was permitted under the terms of the Act itself, the contract was **admittedly a valid and binding contract**, and was enforceable in the trial court under the decisions of this Court and the other courts of appeals, cited supra.

In Wachovia Bank & Trust Co., Guardian, etc. v. U. S., decided August 26, 1938, by the United States Circuit Court of Appeals, Fourth Circuit, 98 Fed. (2nd) 609, the Government enforced a similar contract to purchase land at $8.50 an acre. The Court of Appeals for the Fourth Circuit held that the trial court did not err in refusing to hear evidence tending to prove values, and that the parties were bound by the contract price. The petitioner in the case at bar contended in the trial court that the parties were bound by the price fixed in the contract, but the trial court struck out the answer raising this issue; this violated the substantive rights of this petitioner.

Fuller v. Claflin, 93 U. S. 14;
In re Gloria, 286 Fed. 188.

CONCLUSION.

It will thus be seen that the two questions presented for this Court's consideration are questions of great importance. The question of "**taking**" involve large public interests and, as we have indicated above, there are numerous cases now pending involving this question and the question is now pending on certiorari before this Court in the two cases mentioned above that we know of. It would be a manifest injustice for the three months period to expire within which time certiorari can be applied for in the case at bar, and then in all probability have this Court hold that there is a taking in the said two companion cases now pending on certiorari in this court. We sin-

cerely hope that in the interest of justice and equity, this Court will grant the writ, assume jurisdiction and grant a hearing in the case at bar along with the Sponenbarger case and Franklin cases.

The question of enforcing the above-mentioned contract fixing the damages and involving the question of the right of the trial court to entertain "**jurisdiction**" in the same suit where the Government brings a proceeding is of great public importance. We think that the decisions of this Court clearly establish the jurisdiction of the trial court to do justice between the parties and decide all issues involved in the transaction or connected with the subject matter, when the Government has filed a proceeding involving the same. But it is obvious that there is some confusion in the courts of appeal, and we feel that the Court of Appeals in the case at bar has wholly misconstrued the decisions of this Court, as we have pointed out, when the Court of Appeals held that the rule of this Court governing these cases is **only** applicable to **admiralty** cases. As we view it, the Wachovia case, cited supra, is in conflict with the case at bar, and the opinion of the Court of Appeals militates against the principle announced by this Court as set out above.

We earnestly urge upon the Court to grant the writ and to settle the two questions involved and reverse the decision of the Court of Appeals.

Respectfully submitted,

J. L. LONDON,
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St. Louis, Missouri,
Attorney for Petitioner.

LEAHY, WALTHER, HECKER & ELY,
1105 Commerce Building,
St. Louis, Missouri,
Of Counsel.

APPENDIX.

The Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C., Title 33, Sec. 702a *et seq.*) provides as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project; is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project

and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided*, That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further*, That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of $325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

Sec. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, heretofore made by the local interests in the alluvial

valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

Sec. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide, without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however*, That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks

of the river; it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: *Provided*, That in all cases where the execution of the flood control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights-of-way which, in the opinions of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right-of-way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right-of-way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights-of-way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights-of-way needed for works of flood control: *Provided*, That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

* * * * * * * * *

Sec. 8. The project herein authorized shall be prose-

cuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided*, That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be $10,000 per annum, and the salary of the other members of the commission shall hereafter be $7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

EXHIBIT A.

In the United States District Court
Eastern District of Missouri
Southeastern Division.

United States of America,
Plaintiff,
vs.
William H. Danforth, et al.,
Defendants.
No. 423.

FINDINGS AND FINAL JUDGMENT.

Now on this, the 6th day of December, 1930, comes the above named plaintiff, the United States of America, through and by its attorneys, Louis H. Breuer, Esquire, United States District Attorney for the Eastern District of Missouri, Southeastern Division, and John C. Dyott, Esquire, Special Assistant to the aforesaid district attorney, and moves the Court for final order in said cause, and the Court being fully advised in the premises, and as to all matters pertaining thereto, and upon all the records in the case, and the evidence submitted by the respective parties or such of them as appear, doth find and adjudge and decree in the manner following, to-wit:

The Court find that the United States of America is plaintiff, and that the following are defendants:

William H. Danforth: Wilbur E. Hoag, trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated May 28, 1920 and filed June 8, 1920 in book 69 at page 118 of the records of Mississippi County, Mo., to which record reference is made; Northwestern Mutual Life Insurance Company, a corporation, cestui que trust in

the above mentioned deed of trust; Wilbur E. Hoag, trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 1, 1920 and filed June 18, 1920 in book 69 at page 124 of the records of Mississippi County, Mo., to which record reference is made; Northwestern Mutual Life Insurance Company, a corporation, cestui que trust in the above mentioned deed of trust; Wilbur E. Hoag, trustee for the Northwestern Mutual Life Insurance Company, a corporation, in a certain deed of trust dated June 14, 1920 and filed June 24, 1920 in book 69 at page 128 of the records of Mississippi County, Missouri, to which record reference is made; Northwestern Mutual Life Insurance Company, a corporation, cestui que trust in the above mentioned deed of trust; W. W. Norman, Anniston, Missouri, renter; S. H. Graham, Route 2, East Prairie, Missouri, renter; Alvin Estes, Route 2, East Prairie, Missouri, renter; Levee District No. 1, a corporation operating in Mississippi County, Mo.; the unknown persons, owners and holders of bonds of Levee District No. 1 in the aggregate sum of $153,000.00, designated as Series D and Series E, and maturing annually from 1929 to 1928 inclusive, and as further described in the petition; Drainage District No. 23, a corporation operating in Mississippi County, Mo.; the unknown persons, owners and holders of bonds of Drainage District No. 23 in the sum of $1,000.00 each, Nos. 110 to 240 inclusive, and maturing annually from 1924 to 1931 inclusive, and as further described in the petition; St. John Levee & Drainage District, a corporation operating in Mississippi County, Mo.; the unknown persons, owners and holders of bonds of St. John Levee & Drainage District in the aggregate sum of $1,117,000.00, as represented by ten issues, one to ten inclusive, and as further described in the petition.

The Court finds that this proceeding was instituted by the plaintiff in the way and manner as by statute in such case made and provided; that said petition sets forth a

complete cause of action in condemnation of certain real estate for public use, as provided by and in conformity with, and authorized by the act of Congress of May 15, 1928, and known and designated as the Flood Control Act;

The Court doth further find that this action was duly authorized and begun as provided by law, and that all proceedings thereunder, including the issuance of all process, writs and notices, are in conformity with the statute in such case made and provided.

And the Court doth further find that all persons named as defendants herein have been lawfully and legally served with all necessary writs and notices required by law, and in the way and manner by law required and prescribed, and that the Court has jurisdiction of both the subject matter involved in said petition, and of all parties named as defendants;

The Court doth further find that the said plaintiff gave due, proper and legal notice to all defendants, of the place where and time when it, the said plaintiff would apply for the appointment of appraisers or viewers of the premises described in said petition, to assess damages and compensation to be paid the said owners thereof for the taking of the premises described, for public use as in said petition set forth; and that the said Court did in accordance with said notice, upon the 24th day of April, 1930, appoint three viewers, to-wit: E. P. Deal, J. C. Stewart and E. C. Davis, to view said premises, to fix the damages done said property, and to assess the compensation to be paid therefor by the plaintiff;

The Court doth further find that the said viewers before entering upon the discharge of the duties assigned by the Court to them, and by the law in such case made and provided, did take and subscribe to the required oath;

that the aforesaid viewers so appointed were qualified in all respects for the duties assigned them; that on the 13th day of June, 1930, in furtherance of their duties, lawful, proper and legal return and report was made by said viewers, and the Court doth find that the said report so made was in all respects adequate and proper and in due form;

The Court doth further find that the Clerk of this Court did, in due form, and in the way and manner provided by law, notify each and all, both plaintiff and defendants, of the filing of their said report by said viewers, and that the defendant, William H. Danforth did, on the 5th day of July, 1930, and within the time, and in the way and manner prescribed by law, duly except to the report of said viewers as to the matters therein contained; and that so-called exceptions were filed by certain levee and drainage districts named in the caption of the said petition, and it further appearing that said exceptions were not sufficient in form to constitute a valid reason why the said viewers' report should not be confirmed, and that upon the 6th day of December, 1930, the attorneys for the plaintiff filed a motion with this Court asking for dismissal of the exceptions of the said levee and drainage districts, and the matter being taken up instanter by the said Court, the Court being fully advised in the premises did dismiss and strike from the records, without prejudice, the aforesaid exceptions; and that the other defendants named in said petition did fail to file any exceptions, and that said defendants so failing are hereafter barred from so doing, or voicing objections thereto;

The Court doth further find that on the 6th day of December, 1930, upon due notice to all parties, said cause came on to be heard on the exceptions filed by the defendant William H. Danforth, and that parties hereto

waived the right of a trial by jury, and the issues were by agreement submitted to the Court sitting in lieu of the jury; and being fully advised in the premises, and upon evidence submitted by both the plaintiff and defendant, the Court did find the issues in the manner following:

That the plaintiff herein is entitled to a judgment in condemnation, and the defendants herein, in solido, are entitled to damages in the sum of $17,000.00, being the full amount to which the said defendants are entitled, for the land taken for the set-back levee right of way, and the damages caused thereby to the remainder of the said property;

And it further appearing that pursuant to court order made and entered, the plaintiff herein did on or about the 27th day of January, 1930, deposit within the registry of this court the sum of ($7900.50) to apply upon such sum as might be found due and owing the defendants herein for the premises sought to be condemned and as hereinafter described; and the plaintiff did thereupon under authority of the statutes of the United States, and further upon order of this Court, take possession of said premises, and that the said plaintiff is now lawfully and legally in possession thereof, for the purposes for which said action in condemnation was brought;

And it further appearing to the Court that the defendants are entitled to a total of $17,000.00 for damages, the Court doth further find that the plaintiff herein is required and ordered to deposit within the registry of this court the additional sum of $9099.50, in order to secure title to said property; and the Court doth further find that the premises needed and required by the plaintiff, and which said premises this plaintiff seeks to condemn, and which said premises were viewed by said commissioners or view-

ers, and which are included in the report thereof, are bounded, defined and described as follows:

A parcel of land lying wholly within the west half of Section 22 and the west half of Section 27, all in T. 25 N., R. 16 E., of the 5th principal meridian, Mississippi County, Mo., as shown on the above plat, and being more particularly described as follows: Beginning at a point "A", the said point "A" being on the line between the said section 22 and the said section 27, and being North 89° 27′ East, 151.4 feet from the northwest corner of the said section 27; thence North 19° 47′ East, 1228.7 feet to point "B"; thence North 70° 13′ West, 25.0 feet to point "C"; thence North 19° 47′ East, 1200.0 feet to point "D"; thence South 70° 13′ East, 20.0 feet to point "E"; thence North 19° 47′ East, 329.7 feet to point "F"; thence North 12° 01′ East, 2756.5 feet to point "G", the said point "G" being on the north line of the said section 22; thence South 89° 41½′ East, 439.1 feet along the said north line of the said section 22 to point "H"; thence South 12° 01′ West, 3663.4 feet to point "I"; thence South 19° 47′ West, 1188.5 feet to point "J"; thence North 70° 13′ West, 145.0 feet to point "K"; thence South 19° 47′ West, 686.0 feet to point "L," the said point "L" being on the said line between tha said section 22 and the said section 27, and being North 89° 27′ East, 562.0 feet from the northwest corner of the said section 27; thence South 19° 47′ West, 446.7 feet to point "M"; thence South 0° 00½′ West, 2269.3 feet to point "N"; thence South 89° 44½′ East, 20.0 feet to point "O"; thence South 0° 15½′ West, 1907.9 feet to point "P"; thence South 89° 44½′ East, 65.0 feet to point "Q"; thence South 0° 15½′ West, 675.8 feet to point "R"; the said point "R" being on the north line of concrete highway right of way; thence North 89° 38½′ West, 256.3 feet along the said north right of way line of the said highway to point "S", the said point "S" being the point of beginning of a 32° 15′ curve to the right, which has a radius of

180 feet and central angle of 90° 07′; thence 279.4 feet along the said curve on the said highway right of way line to point "T", the said point "T" being on the end of the said curve on the said highway right of way line; thence North 0° 09⅓′ East, 4721.7 feet along the east line of the said highway right of way line to point "U"; thence North 19° 47′ East, 356.1 feet, more or less, to point of beginning; the said parcel containing 105.34 acres, more or less, subject to easements or rights of way, as shown on aforesaid plat, of .38 acres, more or less, for public road across center of parcel and 2.7 acres, more or less, for drainage ditch. The bearings of boundaries in this description are referred to true North.

The Court doth further find that all of the above described premises are needed and required by the plaintiff in the completion of the project as provided for by the act of Congress of May 15, 1928, Chapter 569;

Now therefore, it is ordered, adjudged and decreed that the plaintiff-condemnor in this said proceeding, to-wit, the United States of America, by virtue of this proceeding, shall have judgment in condemnation against the premises described in the said petition, and the defendants herein, and that the title in fee simple to said premises heretofore described shall without reservation vest in the plaintiff herein, the United States of America; that the said defendants, and each and all, jointly and severally, shall be divested of any and all right, title, interest and claim thereunder, of any name or nature, and that the said premises and the title thereto and the possession thereof shall be and the same are hereby vested in the United States of America and its assigns forever; and it is further ordered that the said United States of America, its servants and agents, for and in consideration of the foregoing premises, shall pay into the registry of this court the sum of $9099.50, for the use and benefit of the said defendants

named in said petition, and any and all other persons who may be found entitled thereto, in the way and manner and in proportion as this court shall hereafter order, adjudge and decree.

C. B. Faris,
U. S. District Judge.

Dated this, the 6th day of December, 1930.

Endorsed: Filed December 6th, 1930. Jas. J. O'Connor, Clerk.

United States of America,
Eastern District of Missouri, } ss.
Southeastern Division.

I, Jas. J. O'Connor, Clerk of the United States District Court in and for the Eastern District of Missouri, do hereby certify that the annexed and foregoing is a true and full copy of the original Findings and Final Judgment as filed and entered in said Court on the 6th day of December, 1930, in cause No. 423, wherein the United States of America is plaintiff and William H. Danforth, et al., are defendants, and I do further certify that the petition in condemnation in the aforementioned cause was filed in said Court on the 16th day of January, 1930, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court, at Cape Girardeau, Mo., this 7th day of August, A. D. 1939.

Jas. J. O'Connor,
Clerk,
By James M. Arnold,
Deputy Clerk.

(Seal)